

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

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BRYCE ROSEMORE,

Plaintiff,

v.

MINERAL COUNTY SHERIFF'S OFFICE,  
*et. al.*,

Defendants.

Case No. 3:21-CV-00451-RCJ-CLB

**REPORT AND RECOMMENDATION OF  
U.S. MAGISTRATE JUDGE<sup>1</sup>**

Before the Court is Plaintiff Bryce Rosemore's ("Rosemore"), application to proceed *in forma pauperis* (ECF No. 1), and his *pro se* civil rights complaint (ECF No. 1-1). For the reasons stated below, the Court recommends that Rosemore's *in forma pauperis* application, (ECF No. 1), be granted, and his complaint, (ECF No. 1-1), be dismissed, with prejudice, as to certain defendants, and dismissed, without prejudice, and with leave to amend, as to other defendants, as specified below.

**I. IN FORMA PAUPERIS APPLICATION**

A person may be granted permission to proceed *in forma pauperis* ("IFP") if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

Pursuant to LSR 1-1: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on

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<sup>1</sup> This Report and Recommendation is made to the Honorable Robert C. Jones, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 the form provided by the court and must include a financial affidavit disclosing the  
2 applicant's income, assets, expenses, and liabilities."

3 "[T]he supporting affidavit [must] state the facts as to [the] affiant's poverty with  
4 some particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th  
5 Cir. 1981) (quotation marks and citation omitted). A litigant need not "be absolutely  
6 destitute to enjoy the benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*,  
7 335 U.S. 331, 339 (1948).

8 A review of the application to proceed IFP reveals Rosemore cannot pay the filing  
9 fee; therefore, the Court recommends that the application, (ECF No. 1), be granted.

## 10 **II. SCREENING STANDARD**

11 Prior to ordering service on any Defendant, the Court is required to screen an *in*  
12 *forma pauperis* complaint to determine whether dismissal is appropriate under certain  
13 circumstances. See *Lopez*, 203 F.3d at 1126 (noting the *in forma pauperis* statute at 28  
14 U.S.C. § 1915(e)(2) requires a district court to dismiss an *in forma pauperis* complaint  
15 for the enumerated reasons). Such screening is required before a litigation proceeding  
16 *in forma pauperis* may proceed to serve a pleading. *Glick v. Edwards*, 803 F.3d 505, 507  
17 (9th Cir. 2015).

18 "[T]he court shall dismiss the case at any time if the court determines that – (A)  
19 the allegations of poverty is untrue; or (B) the action or appeal – (i) is frivolous or  
20 malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks  
21 monetary relief against a defendant who is immune from such relief." 28 U.S.C. §  
22 1915(e)(2)(A), (B)(i)-(iii).

23 Dismissal of a complaint for failure to state a claim upon which relief may be  
24 granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. §  
25 1915(e)(2)(B)(ii) tracks that language. When reviewing the adequacy of a complaint  
26 under this statute, the court applies the same standard as is applied under Rule 12(b)(6).  
27 See, e.g., *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) ("The standard for  
28 determining whether a plaintiff has failed to state a claim upon which relief can be granted

1 under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of Civil Procedure 12(b)(6)  
2 standard for failure to state a claim.”). Review under Rule 12(b)(6) is essentially a ruling  
3 on a question of law. *See Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir.  
4 2000) (citation omitted).

5 The Court must accept as true the allegations, construe the pleadings in the light  
6 most favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor. *Jenkins v.*  
7 *McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted). Allegations in *pro se* complaints  
8 are “held to less stringent standards than formal pleadings drafted by lawyers[.]” *Hughes*  
9 *v. Rowe*, 449 U.S. 5, 9 (1980) (internal quotations marks and citation omitted).

10 A complaint must contain more than a “formulaic recitation of the elements of a  
11 cause of actions,” it must contain factual allegations sufficient to “raise a right to relief  
12 above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).  
13 “The pleading must contain something more. . . than. . . a statement of facts that merely  
14 creates a suspicion [of] a legally cognizable right of action.” *Id.* (citation and quotation  
15 marks omitted). At a minimum, a plaintiff should include “enough facts to state a claim to  
16 relief that is plausible on its face.” *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662,  
17 678 (2009).

18 A dismissal should not be without leave to amend unless it is clear from the face  
19 of the complaint the action is frivolous and could not be amended to state a federal claim,  
20 or the district court lacks subject matter jurisdiction over the action. *See Cato v. United*  
21 *States*, 70 F.3d 1103, 1106 (9th Cir. 1995); *O’Loughlin v. Doe*, 920 F.2d 614, 616 (9th  
22 Cir. 1990).

### 23 **III. SCREENING OF COMPLAINT**

24 In his complaint, Rosemore sues Defendants Mineral County Sheriff’s Office,  
25 Undersheriff William “Bill” Ferguson, Deputy Sheriff Brian Angiano, Hawthorne Justice  
26 Court, Justice of the Peace Mike James, Mineral County District Attorney’s Office, District  
27 Attorney Sean Rowe, and Deputy District Attorney T. Jarren Stranton for civil rights  
28 violations pursuant to 42 U.S.C. § 1983. (ECF No. 1-1.) Rosemore alleges the following:

1 On May 4, 2021, Ferguson received a call from someone who said, “Bryce Rosemore is  
2 at the store yelling at people who aren’t there.” (*Id.* at 5.) Subsequently, Ferguson and  
3 Angiano pulled Rosemore over during a traffic stop and asked to conduct a field sobriety  
4 test, which Rosemore declined due to his “disabilities.” (*Id.*) Rosemore alleges he was  
5 immediately placed under arrest, taken to jail and then to the hospital to have his blood  
6 drawn to check for alcohol and other controlled substances. (*Id.*) Rosemore states twelve  
7 weeks later the toxicology results came back “showing [he] was innocent” and ultimately  
8 charges were dismissed on August 18, 2021. (*Id.*)

9 Rosemore alleges that Ferguson and Angiano forcefully drew Rosemore’s blood  
10 and obtained a search warrant without probable cause. (*Id.* at 6.) Rosemore alleges  
11 Justice of the Peace James signed a warrant for Rosemore’s blood without probable  
12 cause. (*Id.*) Rosemore alleges District Attorneys Rowe and Stranton “deliberately used  
13 their power to continuously deprive [Rosemore] of [his] liberty without due process.” (*Id.*)  
14 No specific allegations are made against the Mineral County Sheriff’s Office, Hawthorne  
15 Justice Court, or Mineral County District Attorney’s Office. Rosemore seeks damages in  
16 the amount of \$400,000. (*Id.* at 8.)

17 **A. Sheriff’s Office Defendants**

18 First, as to Defendants Ferguson and Angiano, Rosemore’s allegation is that they  
19 forcefully drew Rosemore’s blood and obtained a search warrant without probable cause,  
20 which the Court interprets as a Fourth Amendment claim. The Fourth Amendment  
21 prohibits “unreasonable searches,” and Supreme Court caselaw establishes that the  
22 taking of a blood sample or the administration of a breath test constitutes a search.  
23 *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2173 (2016) (citing *Skinner v. Railway Labor*  
24 *Executives’ Assn.*, 489 U.S. 602, 616-17 (1989); *Schmerber v. California*, 384 U.S. 757,  
25 767-68 (1966)). However, from what the Court can discern from the allegations of  
26 Rosemore’s complaint, it appears Rosemore refused to take a field sobriety test so the  
27 officers obtained a search warrant *before* drawing Rosemore’s blood. “When officers in  
28 drunk-driving investigations can reasonably obtain a warrant before having a blood

1 sample drawn without significantly undermining the efficacy of the search, the Fourth  
2 Amendment mandates they do so.” *Missouri v. McNeely*, 569 U.S. 141, 152 (2013) (citing  
3 *McDonald v. United States*, 335 U.S. 451, 456 (1948).) Further, “[a] police officer  
4 generally has qualified immunity for conducting an unconstitutional search if he is acting  
5 on the basis of a facially valid warrant.” *Barlow v. Ground*, 943 F.2d 1132, 1139 (9th Cir.  
6 1991). See also *Skoog v. County of Clackamas*, 469 F.3d 1221, 1231 (9th Cir. 2006)  
7 (when probable cause existed for issuance of warrant and seizure of evidence, Plaintiff  
8 cannot plead facts to support violation of Fourth Amendment); *Mills v. Graves*, 930 F.2d  
9 729, 731 (9th Cir. 1991) (“immunity will be lost only where the warrant application is so  
10 lacking in indicia of probable cause as to render official belief in its existence  
11 unreasonable”).

12 As currently plead, Rosemore has failed to state a claim upon which relief can be  
13 granted in his original Complaint, since he has failed to demonstrate whether the search  
14 warrant about which he complains was valid or facially valid, or any facts to determine  
15 whether the law enforcement officers who executed the warrant had qualified immunity  
16 for their actions. Since Rosemore has not set out enough facts to allow the Court to  
17 discern if he can cure the deficiencies in his Complaint, the Court recommends the Fourth  
18 Amendment claim against Ferguson and Angiano be dismissed, with leave to amend, to  
19 allow Rosemore the opportunity to do so.

#### 20 **B. Justice Court Defendants**

21 Next, the Court recommends that Hawthorne Justice Court be dismissed, with  
22 prejudice, as it is immune from suit in federal court under the Eleventh Amendment. A  
23 justice court is part of the state judicial branch rather than a local or municipal court. See  
24 *generally Heckman v. Dodd*, No. 2:11-cv-00480-RLH-LRL, #6, at 5 (D. Nev. May 2, 2011);  
25 see also Nev. Const. art. 6, § 1. As a part of the judicial arm of the State, a state court  
26 may not be sued in federal court because of the state sovereign immunity recognized by  
27 the Eleventh Amendment. State sovereign immunity bars suit in federal court against a  
28 State or an arm of the State regardless of the relief sought. See, e.g., *Pennhurst State*

1 *School & Hospital v. Halderman*, 465 U.S. 89, 100-01 (1984). Nevada has explicitly  
2 refused to waive its immunity to suit under the Eleventh Amendment. NRS 41.031(2).

3 Additionally, Justice of the Peace James is absolutely immune from suit under §  
4 1983 and should also be dismissed, with prejudice, from this action. See *Schucker v.*  
5 *Rockwood*, 846 F.2d 1202, 1204 (9th Cir. 1988) (“Judges are absolutely immune from  
6 damage actions for judicial acts taken within the jurisdiction of their courts.... A judge  
7 loses absolute immunity only when [the judge] acts in the clear absence of all jurisdiction  
8 or performs an act that is not judicial in nature.”).

9 **C. District Attorney’s Office Defendants**

10 The Court also recommends that Mineral County District Attorneys Rowe and  
11 Stranton be dismissed from this action, with prejudice, as they are also absolutely immune  
12 from suit under § 1983. State prosecutors are absolutely immune from § 1983 actions  
13 when performing functions “intimately associated with the judicial phase of the criminal  
14 process. See *Imbler v. Pachtman*, 424 U.S. 409, 427, 430 (1976); see also *Van de Kamp*  
15 *v. Goldstein*, 555 U.S. 335, 341–43 (2009) (Absolute immunity applies when a state  
16 prosecutor prepares to initiate a judicial proceeding or appears in court to present  
17 evidence in support of a search warrant application).

18 **D. Mineral County Sheriff’s Office and District Attorney’s Office**

19 As noted above, there are no allegations against Defendants Mineral County  
20 Sheriff’s Office and Mineral County District Attorney’s Office in the complaint. However,  
21 even if any allegations were asserted against these entities, any claims against them  
22 should be dismissed, with prejudice, as they are not proper defendants. Under Nevada  
23 law, “in the absence of statutory authorization, a department of the municipal government  
24 may not, in the department name, sue or be sued.” *Wayment v. Holmes*, 112 Nev. 232,  
25 237-38 (1996).

26 **E. Review of State Court Decision**

27 The Court finally notes that, to the extent Rosemore is asking this Court to review  
28 a state court decision, it does not have jurisdiction to sit as an appellate court in review of

1 state court decisions. Any error in state court proceedings must be corrected by the  
2 appellate courts of the state and ultimately, where grounds exist, by the United States  
3 Supreme Court. *Atlantic Coast Lines R.R. Co. v. Brotherhood of Locomotive Engineers*,  
4 398 U.S. 281 (1970). There is no indication that Rosemore cannot raise his constitutional  
5 claims in state court.

#### 6 **F. Leave to Amend**

7 As noted above, the Court recommends that Rosemore be granted leave to file an  
8 amended complaint to cure the deficiencies of his Fourth Amendment claim against  
9 Defendants Ferguson and Angiano, only. If Rosemore chooses to file an amended  
10 complaint, he is advised that an amended complaint supersedes (replaces) the original  
11 complaint and, thus, the amended complaint must be complete in itself. See *Hal Roach*  
12 *Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (holding  
13 that “[t]he fact that a party was named in the original complaint is irrelevant; an amended  
14 pleading supersedes the original”); see also *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928  
15 (9th Cir. 2012) (holding that for claims dismissed with prejudice, a plaintiff is not required  
16 to reallege such claims in a subsequent amended complaint to preserve them for appeal).  
17 For each Defendant and each claim, Rosemore must allege true facts sufficient to show  
18 that the Defendant violated Rosemore’s civil rights. Rosemore may not amend the  
19 complaint to add unrelated claims against other defendants. If Rosemore chooses not to  
20 file an amended complaint curing the stated deficiencies, the Court will issue a Report  
21 and Recommendation to dismiss the case for failure to state a claim.

#### 22 **IV. CONCLUSION**

23 For good cause appearing and for the reasons stated above, the Court  
24 recommends that Rosemore’s application to proceed *in forma pauperis*, (ECF No. 1), be  
25 granted, and his complaint, (ECF No. 1-1), be dismissed, with prejudice as to some  
26 claims, and without prejudice and with leave to amend as to others, as specified above.

27 The parties are advised:

- 28 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of



1 Practice, the parties may file specific written objections to this Report and  
2 Recommendation within fourteen days of receipt. These objections should be entitled  
3 "Objections to Magistrate Judge's Report and Recommendation" and should be  
4 accompanied by points and authorities for consideration by the District Court.

5 2. This Report and Recommendation is not an appealable order and any  
6 notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the  
7 District Court's judgment.

8 **V. RECOMMENDATION**

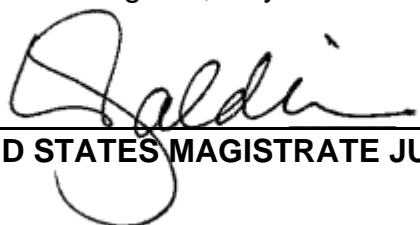
9 **IT IS THEREFORE RECOMMENDED** that Rosemore's application to proceed *in*  
10 *forma pauperis*, (ECF No. 1), be **GRANTED**;

11 **IT IS FURTHER RECOMMENDED** that the Clerk **FILE** the complaint, (ECF No. 1-  
12 1);

13 **IT IS FURTHER RECOMMENDED** that Rosemore's complaint, (ECF No. 1-1), be  
14 **DISMISSED, WITH PREJUDICE**, as to his claims against Mineral County Sheriff's Office,  
15 Hawthorne Justice Court, Mike James, Mineral County District Attorney's Office, Sean  
16 Rowe, and T. Jarren Stranton, as amendment would be futile; and,

17 **IT IS FURTHER RECOMMENDED** that Rosemore's complaint, (ECF No. 1-1), be  
18 **DISMISSED, WITHOUT PREJUDICE, AND WITH LEAVE TO AMEND**, as to his Fourth  
19 Amendment claim against Defendants Ferguson and Angiano, only.

20 **DATED:** January 13, 2022.

21   
22 **UNITED STATES MAGISTRATE JUDGE**  
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